

MOTION FILED

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NO. 84-261

In the
Supreme Court of the United States
OCTOBER TERM, 1984

COMMODITY FUTURES TRADING COMMISSION,
Petitioner,
vs.
GARY WEINTRAUB, ET AL.
Respondents.

**MOTION OF JOHN K. NOTZ, JR., TRUSTEE,
FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE
IN SUPPORT OF PETITIONER COMMODITY
FUTURES TRADING COMMISSION**

JOHN K. NOTZ, JR., ESQ.
(Counsel of Record)
DAVID F. HEROY, ESQ.
MICHAEL P. PADDEN, ESQ.

GARDNER, CARTON & DOUGLAS
One First National Plaza
Suite 3200
Chicago, Illinois 60603
(312) 726-2452

Dated: December 13, 1984

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John K. Notz, Jr., Trustee for the Chicago Discount Commodity Brokers, Inc. ("CDCB"), respectfully moves for leave to file BRIEF OF JOHN K. NOTZ, JR., TRUSTEE, AS AMICUS CURIAE IN SUPPORT OF PETITIONER COMMODITY FUTURES TRADING COMMISSION, instanter. The grounds for this motion are set forth below in accordance with Rule 36.3 of the Rules of the Supreme Court.

I. INTRODUCTION

John K. Notz, Jr., Trustee (the "Trustee"), has requested consent to the filing of an *amicus curiae* brief in support of petitioner Commodity Futures Trading Commission ("CFTC") from both petitioner CFTC and respondents Frank

H. McGhee and Andrew McGhee. The CFTC has clearly consented, but Respondents have given a conditioned consent, so that it is not clear whether they consent to the filing of the instant *amicus curiae* brief. The Trustee, therefore, seeks leave of court to file the instant *amicus curiae* brief.

II. STATEMENT OF INTEREST

The issue presented in this case is whether a Chapter 7 bankruptcy trustee has the power to claim or waive a corporate debtor's pre-petition attorney-client privilege. The Trustee is the Chapter 7 bankruptcy trustee for the corporate debtor CDCB and it is his waiver of CDCB's pre-petition attorney-client privilege that is at issue here. The decision below has had a significant impact on the Trustee's ability to discharge his duties to CDCB's Chapter 7 estate and will have a similar impact on other bankruptcy trustees for corporate debtors.

III. FACTS AND ARGUMENTS THAT HAVE NOT BEEN ADEQUATELY PRESENTED AND THEIR RELEVANCY TO THE DISPOSITION OF THIS CASE

The issue of whether a bankruptcy trustee has the power to assert or waive the pre-petition attorney-client privilege of a corporate debtor is presented here in the unusual context of a CFTC enforcement action. While the Trustee is not a party to this action, the resolution of the issue will likely have its greatest impact on bankruptcy trustees, such as the Trustee here. A trustee under Chapter 7 of the Bankruptcy Code is required to collect and reduce to money the assets of the estate and to close up the estate as expeditiously as is compatible with the best interests of parties in interest. 11 U.S.C. § 704. Because the property of the estate includes causes of action which belong to the debtor when the petition is filed, 11 U.S.C. § 541; 4 *Collier On Bankruptcy*, ¶541.10 (15th Ed. 1984), the trustee is required to investigate and prosecute these actions for the benefit of the estate. The Trustee's experience in the administration of the CDCB estate has

demonstrated that the right to control the attorney-client privilege is a right that bankruptcy trustees must have in order to fulfill their statutory duty to investigate and prosecute actions on behalf of the debtor's estate. This argument has not been adequately presented by the parties below and will probably not be adequately presented here.

The particular facts and circumstances leading to the waiver at issue here are relevant to the disposition of this case, especially in light of Respondents' characterization of these facts. Respondents Frank and Andrew McGhee have argued by implication and innuendo that there was something improper about the Trustee's waiver of CDCB's pre-petition attorney-client privilege. See, e.g., Brief of Respondents In Opposition To The Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit, pp. 2-3, 6, 19-20; Answer To Petition For Rehearing, pp. 1, 6-7; Brief Of Intervening Respondent/Appellants, pp. 15, 24, 25. Because the Trustee is most familiar with the facts and circumstances leading to his waiver, he is best able to present these facts to the Court in response to Respondents' characterizations. These facts have not been adequately presented by the parties and would probably not be adequately presented here.

Respectfully submitted,

JOHN K. NOTZ, JR., ESQ.

(Counsel of Record)

DAVID F. HEROY, ESQ.

MICHAEL P. PADDEN, ESQ.

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STATEMENT OF INTEREST

John K. Notz, Jr., Trustee (the "Trustee") incorporates by reference herein the Statement Of Interest and Facts And Arguments That Have Not Been Adequately Presented And Their Relevancy To The Disposition Of This Case set forth in parts II and III, respectively, of his Motion For Leave To File Brief As Amicus Curiae which immediately precedes and is bound together with this brief.

ARGUMENT

The Trustee previously filed a brief in support of the Commodity Futures Trading Commission's ("CFTC") Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. In that brief the Trustee argued that, based on his experience in CDCB's Chapter 7

liquidation proceeding, bankruptcy trustees must have the right to control the pre-petition attorney-client privilege of the debtor corporation. The Trustee further argued that the holding below would allow dishonest management to protect itself from personal liability to the estate as the CDCB "insiders" have attempted to do here. These arguments, as more fully presented in the Trustee's prior brief, are incorporated herein as arguments on the merits. The Trustee also adopts the arguments submitted by the CFTC in its briefs before this Court. The following is submitted in addition to all of those arguments.

The Trustee's Waiver Of CDCB's Pre-Petition Attorney-Client Privilege Was In The Best Interests Of CDCB's Chapter 7 Estate

Respondents Frank and Andrew McGhee have argued by implication and innuendo that there was something improper about the Trustee's waiver of CDCB's pre-petition attorney-client privilege. They depict the Trustee as an unthinking pawn in a scheme by the CFTC to circumvent the privilege.¹

Contrary to this characterization, the Trustee initially sought to preserve the privilege as an asset of CDCB's Chapter 7 estate. The Trustee later sought information that Weintraub refused to disclose on the basis of the CDCB's attorney-client privilege. Upon Weintraub's refusal to divulge that information, it became in the best interests of CDCB's Chapter 7 estate for the Trustee to waive the privilege.

The Trustee first became involved with the affairs of CDCB on October 27, 1980, when he was appointed Receiver for CDCB by United States District Court Judge James B.

¹ See, e.g., Brief of Respondents In Opposition To The Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit, pp. 2-3, 6, 19-20; Answer To Petition For Rehearing, pp. 1, 6-7; Brief Of Intervening Respondent/Appellants, pp. 15, 24, 25.

Moran in case No. 80 C 5755 in the Northern District of Illinois, Eastern Division (the "Civil Proceeding"). The CFTC had filed a complaint against CDCB, alleging various violations of the Commodity Exchange Act. The Trustee was appointed Receiver pursuant to an order (the "Consent Order") which authorized him to take custody and control of all of CDCB's assets and assume all of CDCB's powers to manage and control these assets. R. Supp., Ex. 1. Included was a specific authorization to file a voluntary petition for liquidation on behalf of CDCB under Chapter 7 of the Bankruptcy Code. *Id.* Frank McGhee, acting as the sole director and officer of CDCB, agreed in writing to the entry of the Consent Order. J.A. 17.

On November 3, 1980, the CFTC conducted a deposition of Weintraub. Appendix To Amicus Curiae Brief of John K. Notz, Jr., Trustee (the "Amicus Appendix"), p. 108.² At that deposition, the Trustee, then acting as Receiver, expressly reserved the right to assert CDCB's attorney-client privilege in connection with Weintraub's legal services to CDCB. Amicus Appendix, p. 109-110.

On November 4, 1980, the Trustee, then acting as Receiver, filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on behalf of CDCB. *In re Chicago Discount Commodity Brokers, Inc.*, No. 80 B 14472 (Bankr. N.D. Ill.). See also Pet. App. 2a. The Trustee became CDCB's Chapter 7 trustee and discharged his duties to discover the assets of the estate and to investigate possible claims. As part of his investigation into possible claims, the Trustee examined Weintraub pursuant to Rule 205 of the then-applicable Rules of Bankruptcy Procedure on November 17 and December 16, 1981. In that examination Weintraub refused to produce documents and refused to answer questions, asserting

² The Amicus Appendix was filed by the Trustee in the Court of Appeals for the Seventh Circuit as an addendum to the Brief Of John K. Notz, Jr., Trustee, As Amicus Curiae In Support Of The Petition Of The Commodity Futures Trading Commission For Rehearing With Suggestion That Rehearing Be *En Banc*.

CDCB's pre-petition attorney-client privilege. Amicus Appendix, pp. 5-41. *See also* Brief of John K. Notz, Jr., Trustee, As Amicus Curiae In Support Of The Petition Of The Commodity Futures Trading Commission For Rehearing With Suggestion That Rehearing Be *En Banc*, p. 3.

By the time the Trustee completed his examination of Weintraub on December 16, 1981, the CFTC had initiated an action to compel Weintraub to answer questions which it had posed to him in a deposition pursuant to an investigatory subpoena.³ In view of the already pending CFTC action, a separate proceeding by the Trustee against Weintraub would have been a duplicative and unnecessary administrative expense of CDCB's Chapter 7 liquidation proceeding.

On March 6, 1982, the CFTC requested that the Trustee waive CDCB's attorney-client privilege "in the best interests of the creditors of CDCB as well as the corporate debtor." J.A. 48. On March 11, 1983, the Trustee waived any interest which he may have had in the attorney-client privilege of CDCB for any pre-petition communications. J.A. 49.

The Trustee's waiver of CDCB's pre-petition attorney-client privilege was in the best interests of CDCB's Chapter 7 estate. It served those interests by assisting the investigation of the pre-petition operations of CDCB while conserving the resources of CDCB's estate. Furthermore, the Trustee's waiver of the privilege was hardly inevitable. To the contrary, the Trustee had asserted his right to claim the privilege against the CFTC during its questioning of Weintraub.

³The CFTC filed its subpoena enforcement action on December 15, 1981. J.A. 33-36.

CONCLUSION

For the foregoing reason, John K. Notz, Jr., as Trustee for the debtor Chicago Discount Commodity Brokers, Inc., respectfully requests that the decision of the United States Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

JOHN K. NOTZ, JR., ESQ.

(Counsel of Record)

DAVID F. HEROY, ESQ.

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